IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN, JAIPUR BENCH, JAIPUR.

1. S. B. CIVIL MISC. APPEAL NO. 2561/2006
(S.N. Kapoor v Kailash Kumar Kapoor & Ano.)

2. S. B. CIVIL MISC. APPEAL NO. 2721/06
(S. N. Kapoor v Kailash Kumar Kapoor & Ano.)

Date of Judgment: 10th October, 2006.

Hon'ble Mr. Justice R. S. Chauhan

Mr. Anshuman Saxena for the Appellant
Mr. G. C. Garg with Mr.Alok Garg for the Respondent No. 1
Mr. Sagar Mal Mehta, Sr. Advocate with
Mr. Nitin Jain for the Respondent No. 2.

(Per Court):

These two appeals arise out of the same controversy between the same set of parties which have been decided by two separate Orders, both dated 19-7-06, thus, these appeals are being decided by this common judgment.

The appellant-plaintiff is challenging the Orders dated 19-7-06 passed by the Additional District Judge, No. 3, Jaipur City, Jaipur, whereby the learned judge has restrained the respondent from construction on the property in dispute, until they give an

undertaking to the court that in case the plaintiff were to win the case, they would surrender the constructed building, or in case the plaintiff wants the newly constructed area to be demolished, they would demolish the same. In case such an undertaking were given, then the defendants would be free to raise the construction and then the order of status-quo would be deemed to be non-existent.

The brief facts of the case are that the appellant-plaintiff filed two suits for pre-emption. Along with the suits, he also filed two applications for temporary injunction under Order 39, Rule 1 and 2 of the Civil Procedure Code (henceforth to be referred to as the Code, for short) in each suit. According to the plaint, a piece of land, situated in Amber in Jaipur, once belonged to one Khwas Bala Buxs. The said land is called “Khwas ji ka Bagh” (the garden of Khwas ji). Khwas Bala Buxs bequeathed the said land to his grandson, one Mahesh Kumar. On 27-7-48, Khwas Bala Buxs died, therefore, the Khwas ji ka Bagh was inherited by Mahesh Kumar. On 27-5-70, Mahesh Kumar entered into an agreement to sell with M/s Krishna Kapoor and Company,

a partnership firm, with regard to said land. However, later on, when Mahesh Kumar did not implement the said agreement to sell, the firm, M/s Krishna Kapoor and Co. filed a suit for specific performance. Eventually, the firm won the suit and the sale deed was registered in its favor. In the firm, the partners were the appellant's father, Mr. Shiv Dayal Kapoor, and his three sons, namely, Mr. R. N. Kapoor, Mr. N. N. Kapoor, and S. N. Kapoor, the appellant before us. After the the death of the appellant's father, the brothers had certain disputes about the family property. Therefore, they appointed a Sole Arbitrator, Mr. H. L. Tikku. Vide award dated 24-12-88, the Sole Arbitrator divided the Khwas ji ka Bagh amongst the four brothers, namely R. N. Kapoor, N. N. Kapoor, S. N. Kapoor (the appellant before this court), and K. K. Kapoor (the respondent No. 1 before this court). According to the said award each brother was the owner of his share. He could utilize his share as per his wish. However, there was a rider with regard to the sale of the share. In case a brother wished to sell the property, he was required to give the first option to the other brothers for purchasing the property. This

award was made the rule of the court on 25-2-89. Subsequently, both Mr. R. N. Kapoor and Mr. N. N. Kapoor, after taking the consent from the appellant, sold their respective shares to other persons, who in-turn constructed their portions. However, both the appellant and the respondent No. 1 did not physically divide their respective shares. In fact, they used the same gate for entrance for the last thirty-five years. There is also a staircase in the residential area, which is used by both the appellant and the respondent. Moreover, the appellant's water pipes, the drainage lines, the electricity lines, and the underground sewerage pipes go under the open land of the respondent No.1. As long as the relationship between the appellant and the respondent No. 1 were harmonious, there was no difficulty in using of the common entrance, the common passage and of letting the pipes go through the land of the respondent No. 1. However, when the appellant noticed the presence of few strangers on the land, he inquired from the office of the Deputy Registrar No. 6, Jaipur. He was informed that vide sale deed dated 29-4-05, the respondent No. 1 had sold 642.43 sq. yards of the land to the respondent

No. 2. Again on 15-11-05, he noticed strangers on the land. Again he inquired from the Deputy Registrar's office. He was informed that vide sale deed dated 30-10-04, the respondent No. 1 had sold another parcel of 494.82 sq. yards of the land to the respondent No. 2. Since the said sales were in contravention of the arbitration award, as the respondent No. 1 did not offer the land to the appellant for sale, the appellant filed the two suits for pre-emption under the Rajasthan Pre-emption Act, 1996 (henceforth to be referred to as 'the Act', for short). As stated above, along with the suits, the appellant had also filed applications for temporary injunction under Order 39, Rule 1 and 2 of the Code. While the first application was registered as Civil Misc. Application No. 21/2006, the second one was registered as Civil Misc. Application No. 33/2006. Both the said applications were decided by two separate Orders dated 19-7-06 as mentioned above. Hence, these two appeals before this court.

Mr. Anshuman Saxena, the learned counsel for the appellant, has strenuously argued that firstly, according to Section 6 of the Act the right of pre-

emption in respect of any immovable property transferred shall accrue to the owners of the other immovable property with a staircase, or an entrance or other right or amenity common to such other property and the property transferred. According to the counsel, both the appellant and the respondent No. 1 have shared the same entrance and other amenities, mentioned above, for the last thirty-five years. Suddenly, with the sale of the land to the respondent No. 2, the appellant is being deprived of the use of the common entrance, of the common passage which gives an accessibility to the appellant's house in the back of the plot, and of the other common amenities which lie underground as mentioned above. Hence, the appellant has a strong prima facie case in his favor. Secondly, the learned Judge has noted in the impugned Order that the appellant has a prima facie case in his favor, yet has permitted the respondent No. 2 to raise construction over the area in case an undertaking is given to transfer the said newly constructed area or to demolish the said newly constructed area in case the appellant were to win the suit. Thirdly, since the respondent No. 1 had sold two other parcels of land to the respondent

No. 2, the appellant had filed two other suits for pre-emption. In those two suits, pending before the Additional District Judge, No. 9, Jaipur City, Jaipur, the learned court has granted the temporary injunction, that of status quo with respect to the common entrance and the common passage, in favor of the appellant. But, in the present cases, the learned Judge has failed to do so. Fourthly, in case the appellant is not allowed to use the common entrance and the common passage, he cannot reach his house in the back of the land. In case any construction is permitted in this particular part, the appellant loses the accessibility to his house. Fifthly, according to the award passed by the Sole Arbitrator, before selling off the land to a third party, the respondent No. 1 was required to make an offer to the appellant, which he failed to do. Hence, the sale is against the said award. Lastly, although the award has been made the rule of the court, but the appellant has filed his objections before the executing court; the said objections are still pending. Till the decision of the said court, the appellant should not be deprived of his usage of common entrance and of common passage.

Mr. Sagar Mal Mehta, Sr. Advocate, as the counsel for respondent No. 2, has vehemently argued that firstly, the suit pre-emption is not maintainable. According to him, the suit has been filed under Section 6 (1) (iii) of the Act. However, the said sub-section has been declared as unconstitutional by this court in the case of ***Nen Mal and etc etc. v Kan Mal and etc. (AIR 1988 Raj. 33)***. Secondly, according to the award of the Sole Arbitrator, each brother was declared to be the absolute owner of the property which fell in his share. Therefore, the respondent No. 1 was free to sell his share to the respondent No. 2. Thirdly, the condition imposed by the Sole Arbitrator about offering the property first to the other brothers, did not relate to the Khwas ji ka Bagh, but related to the family property situated in Amritsar, Punjab. Therefore, the learned judge could not have read the said condition qua the Khwas ji ka Bagh. Lastly, once the property was legally sold to the respondent No. 2, he is free to raise the construction on the said property. Hence, the learned Judge has rightly permitted the construction by the respondent No. 2.

Mr. G. C. Garg, the learned counsel for the respondent No. 1, has fairly admitted that there is a common entrance and a common passage being used by the appellant and the respondent No. 1. However, he has argued that since the respondent No. 1 is the absolute owner of the land which has fallen into his share, he is free to prevent the appellant from using the said common entrance and the common passage. Moreover, once upon a time the appellant had opened a gate on to the main road. But, in order to harass the respondent No. 1, he has closed the said gate and has staked his claim over the common entrance and the common passage. According to the counsel, the appellant has sufficient land to create his own entrance and to have free access to his portion of the residential area in the back of the plot. Further, the matter about the execution of the award is still sub-judice before the court of Additional District Judge, No. 3 Jaipur. The passing of a temporary injunction order would adversely affect the proceedings before the execution court.

In rejoinder, Mr. Saxena has pointed out that the

appellant had breached the wall in order to get a boring well dug up on his land. However, the wall has been closed since the digging of the well. In fact, according to him, there is insufficient land for the appellant to create a gate and a connecting passage way from the outer wall to the house in the back of the plot. Hence, the respondents are unjustified in claiming that the appellant can create an independent entrance for his own use.

We have heard the counsels for the parties and have perused the impugned Order.

Unfamiliar to the Hindu jurisprudence, well known to the Islamic and to the Anglo-Saxon jurists, the law of pre-emption came very late to this country. Adopted from the English Common Law, law of pre-emption is now well entrenched in India. The law of pre-emption was created in order to avoid “the inconvenience and disturbances which would arise from the introduction of a stranger into the land”. In the case of ***Shri Audh Behari Singh v Gajadhar Jaipuria and Others (AIR 1954 SC 417)***, the Hon'ble Supreme Court had an occasion to

trace the history of this law and to make crucial observation about the said law. Their Lordships of the Hon'ble Supreme Court held as under:

> *The correct legal position seems to be that the law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right of sale and compels him to sell the property to his co-sharer or neighbour as the case may be. The person who is a co-sharer in the land or owns land in the vicinity consequently gets an advantage or benefit corresponding to the burden with which the owner of the property is saddled, even though it does not amount to an actual interest in the property sold.*
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> *The crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself.*
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> *It is true that the right becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconvenience and disturbances which would arise from the introduction of a stranger into the land. The sale is a condition precedent not to the existence of the right but to its enforceability.*

Thus, law of pre-emption tries to avoid “the inconvenience and disturbances which would arise from the introduction of a stranger into the land”. It imposes a limitation on the right of the owner to sell

of his land to the strangers and grants an advantage to the co-sharer or neighbor corresponding to the burden with which the owner of the property is saddled, even though it does not amount to an actual interest in the property sold. Moreover, the sale of the land is a condition precedent not to the existence of the right but to its enforceability.

The Act also recognizes the right of pre-emption of the co-sharer and the neighbor. Section 6 of the Act clearly lays down as under:

> Person to whom right of pre-emption accrues:-
>
> *(1) Subject to the other provisions of this Act, the right of pre-emption in respect of any immovable property transferred shall accrue to, and vest in, the following classes of persons namely:-*
>
> *(i) co-sharers of or partners in the property transferred,*
>
> *(ii) owners of other immovable property with a staircase or an entrance or other right or amenity common to such other property and the property transferred, and*
>
> *(iii) owners of property servient or* dominant to the property transferred.

Of course, in the case of Nen Mal (supra) this court had struck down Section 6 (1) (iii) as

unconstitutional. But, the said case did not nullify the existence of the first two sub-clauses, namely Sub-clauses (i) and (ii). The present suit has been filed on the grounds that the appellant and the respondent are sharing the same entrance and staircase and their utility pipes go through the same land. Hence, the suit has been filed under Section 6 (1) (ii) of the Act. Therefore, the contention of Mr. Sagar Mal Mehta that the suit is not maintainable as it was filed under Section 6 (1) (iii) is untenable.

Since the right of pre-emption is a statutory right, it is independent of the award passed by the Sole Arbitrator. Even if the condition of offering the land for sale first to the brothers did not exist in the arbitration award, the appellant still would have the right of pre-emption under the Act. As noted above in the case of Shri Audh Behari Singh (supra) “the law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right of sale and compels him to sell the property to his co-sharer or neighbour as the case may be”. Therefore, the

contention raised by the learned counsel for the respondents that the said condition relates to the property situated in Amritsar is not germane to the controversy before the court.

The question before the learned Judge was whether the appellant and the respondent No. 1 are sharing the common entrance and the common passage way which lead to the house situated in the back of the land or not? A map has been produced before this court, which forms part of the plaint also, which clearly shows that there is a single entrance to the land from the main road. According to the learned counsel for the appellant this entrance has been used by the appellant and the respondent for the last thirty-five years. Mr. Garg, the learned counsel for the respondent has also fairly conceded this point. However, according to Mr. Mehta the respondent No. 1 is free to prevent the appellant from using the said entrance as he is the absolute owner of the land according to the arbitration award. However, the fact also remains that the appellant has filed his objections against the execution of the award before the executing court. Hence, till the executing

court decides the said objection, the respondent No. 1 cannot suddenly prevent the appellant from using the common entrance. In fact, the use of the common entrance and the common passage way and the use of common staircase and the existence of the utility pipes underground form the basis of the suit for pre-emption. Hence, the appellant has a strong prima-facie case for using the common entrance and the common passage.

According to the learned counsel for the appellant there are four suits filed by the appellant against the respondents for pre-emption. While the temporary injunction applications in the present cases have been decided as mentioned above, the learned Additional District Judge, No. 9 has granted a status quo in favor of the appellant qua the common entrance and the common passage way in the other two suits pending in that court. A parity has to be maintained. It would be quite anomalous that while in two suits the appellant is granted temporary injunction by a civil court, in the other two suits, he is denied the same temporary injunction by another civil court.

While granting an injunction, the court has to strike a balance between the interest of the appellant and of the respondents. It would be just to permit the respondent No. 2 to raise the construction, provided he furnishes an undertaking to the effect that in case the appellant were to succeed in his suit, he would either demolish or surrender the newly constructed area as per the wish of the appellant. Therefore, this court is not inclined to interfere with the condition imposed by the learned Judge. However, this court modifies both the Orders dated 19-7-06 to the extent of directing the respondent No. 1 and 2 not to interfere with the appellant's usage of the common entrance and the common passage way leading to his residence in the back of the land during the pendency of the suits.

In the result, this appeal is partly allowed as stated above. No orders as to costs.

(R.S. Chauhan) J.